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July 11, 2018

VIA ELECTRONIC MAIL

Brian Considine
Washington State Gambling Commission
brian.considine@wsgc.wa.gov

Re: *Big Fish Games Petition for Declaratory Order*

Dear Mr. Considine:

My firm represents Cheryl Kater, the plaintiff in *Kater v. Churchill Downs, Inc.*, No. 2:15-cv-00612 pending in the United States District Court for the Western District of Washington. On July 9, 2018, I received notice from your office of a petition for declaratory ruling filed by Churchill Downs' attorney, Matthew Berry. The petition asks the Commission to enter a declaratory order reversing the determination of the United States Court of Appeals for the Ninth Circuit that the Big Fish Casino game constitutes gambling under Washington law. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). I write to inform you that Ms. Kater respectfully declines to consent to the determination of this matter by declaratory order proceeding.

Pursuant to WAC 230-17-180, "[t]he commission may not enter a declaratory order that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding." *Accord* RCW 34.05.240. Ms. Kater is a necessary party because she "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [her] absence may ... as a practical matter impair or impede [her] ability to protect that interest." CR 19(a); *see also Burt v. Washington State Dep't of Corr.*, 168 Wash. 2d 828, 833 (2010) ("Use of the term *may* suggests a low standard that requires a showing of possibility that the failure to join will impair or impede the party's interest."). Specifically, Ms. Kater's case is entirely based on the gambling game that is the subject of the petition. A declaratory order by the Commission relating to that game would potentially be considered authoritative by the federal court hearing her case, meaning that failure to include her in this proceeding has the

strong possibility to impede her ability to protect her interests before the court. *See, e.g., Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1218 n.5 (9th Cir. 2008) (deferring to Washington administrative agency's interpretation of statute). Further, the declaratory order requested in the petition would substantially prejudice Ms. Kater's rights because if Big Fish Casino does not constitute gambling, then she will lose her case and be unable to recover the thousands of dollars she lost. *See Children's Hosp. & Med. Ctr. v. Washington State Dep't of Health*, 95 Wash. App. 858, 875 (1999) (finding that "economic injury" constituted substantial prejudice).

Ms. Kater is a necessary party who would be substantially prejudiced by the requested declaratory ruling, and because she has not provided written consent to determination of this matter by declaratory order proceeding, we respectfully submit that the Commission cannot grant the relief requested in the petition. If I can provide any further information about this matter, please feel free to contact me by email at atievsky@edelson.com or telephone at 312-589-6379. I also plan to attend tomorrow's Commission meeting, and I will be happy to answer any questions from the Commissioners at that time or at a future meeting.

Sincerely,

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Alexander G. Tievsky